Supreme Court, U.S.
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No. 99-356

IN THE

Supreme Court of the United States

CITY OF JACKSONVILLE,

Petitioner,

v.

LADY J. LINGERIE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petitioner/Defendant is the consolidated City of Jacksonville, a municipal corporation located in Duval County, Florida.

The Respondents/Plaintiffs are the following individuals and corporations:

Lady J. Lingerie, Inc.

Jerome Bonnett

Buford B. Breland

Brian A. Cleland

Gregory A. King

Milt Howard

The 14003 Corporation, a Florida corporation

The 850 Corporation, a Florida corporation

Emro Corporation, a Florida corporation

STATEMENT PURSUANT TO RULE 29.6

There are no parent corporations or publicly held companies owning 10% or more of the stock of the corporate Respondents.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
Reasons for Denying the Writ	1
I. The Decision Below Does Not Conflict With Any Decision Of The Second Circuit, Or Any Other Circuit, As The Courts Unanimously Agree That Zoning Exceptions May Constitute A Prior Restraint When Adult Uses Are Not Allowed As A Matter Of Right.	1
A. The City's Position That Prior Restraint Analysis Is Limited To Business Licensing Schemes Is Not Supported By Any Precedent In This Court Or Any Other Court In This Country.	5
B. Use Of More Stringent Prior Restraint Analysis Will Have No Practical Effect On The City's Ability To Zone Or To Protect The Welfare Of Its Citizens.	8

Contents

Page

II. The Decision In *Steakhouse v. City Of Raleigh* Is From An Interlocutory Appeal, Based On A Unique Set Of Facts, And Does Not Present A Conflict With The Decision Below. 11

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

Cases:

Amico v. New Castle County, 571 F. Supp. 160 (D. Del. 1983) 2, 8

Barnes v. Glen Theatre, Inc., 502 U.S. 560, 111 S. Ct. 2456 (1991) 9

Bukaka, Inc. v. County of Benton, 852 F. Supp. 807 (D. Minn. 1993) 2, 8, 15

Carson v. American Brands, Inc., 450 U.S. 79, 101 S. Ct. 993 (1981) 12

City of Renton v. Playtime, Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925 (1986) 3, 4, 5, 6, 8, 9

Crown Street Enterprises, Inc. v. City of New Haven, 989 F. Supp. 420 (D. Conn. 1997) 2, 3, 4, 5

Dease v. City of Anaheim, 826 F. Supp. 336 (C.D. Cal. 1993) 7, 8

D.G. Restaurant Corporation v. City of Myrtle Beach, 953 F.2d 140 (4th Cir. 1991) 8

Dia v. City of Toledo, 937 F. Supp. 673 (N.D. Ohio 1996) 2, 8, 15

11126 Baltimore Boulevard, Inc. v. Prince George's County, Md., 58 F.3d 988 (4th Cir. 1995) 7, 15

Cited Authorities

Page

15192 Thirteen Mile Road, City of Warren, 593 F. Supp. 147 (E.D. Mich. 1984) 8

Franken Equities, L.L.C. v. City of Evanston, 967 F. Supp. 1233 (D. Wyo. 1997) 2, 8, 15

Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734 (1965) 1, 10

FW/PBS v. City of Dallas, 493 U.S. 215, 110 S. Ct. 596 (1990) 1, 2, 5, 7, 11, 14

Marty's Adult World v. Town of Enfield, 20 F.3d 512 (2d Cir. 1994) 2, 3, 5, 9

Santa Fe Springs Realty Corp. v. City of Westminster, 906 F. Supp. 1341 (C.D. Cal. 1995) 7

Schad v. Mount Ephraim, 452 U.S. 61, 101 S. Ct. 2176 (1981) 9

754 Orange Ave., Inc. v. City of West Haven, Conn., 761 F.2d 105 (2d Cir. 1985) 2, 5, 8, 15

Shuttlesworth v. Birmingham, 394 U.S. 147, 89 S. Ct. 935 (1969) 5

Steakhouse, Inc. v. City of Raleigh, 166 F.3d 634 (4th Cir. 1999) 1, 11, 12, 13, 14, 15, 16

Cited Authorities

Page

3570 East Foothill Blvd., Inc. v. City of Pasadena, 912 F. Supp. 1268 (C.D. Cal. 1996) 7, 15

TJ's South, Inc. v. Town of Lowell, 895 F. Supp. 1124 (N.D. Indiana, 1995) 7

University Of Texas v. Camenisch, 451 U.S. 390, 101 S. Ct. 1830 (1981) 11

Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683 (10th Cir. 1998) 8

United States Constitution:

First Amendment 1, 7, 9, 16

STATEMENT OF THE CASE

The decision below properly determined that the Jacksonville zoning exception ordinance was an unlawful prior restraint under the authority of *FW/PBS v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596 (1990) and *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734 (1965). The lower courts are completely unified on this issue and there is no split among the circuits. The case of *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634 (4th Cir. 1999) is an isolated opinion, decided on unusual facts, and does not represent a shift in the legal position of the Fourth Circuit. Neither is it in meaningful conflict with this Eleventh Circuit case. Given the established nature of the legal issues, there is no question of overriding public importance presented by this case.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THE SECOND CIRCUIT, OR ANY OTHER CIRCUIT, AS THE COURTS UNANIMOUSLY AGREE THAT ZONING EXCEPTIONS MAY CONSTITUTE A PRIOR RESTRAINT WHEN ADULT USES ARE NOT ALLOWED AS A MATTER OF RIGHT.

The City claims that there is a conflict among the Circuits concerning the proper analysis of zoning exceptions as prior restraints. The City acknowledges that the case decided below by the Eleventh Circuit is in accord with cases decided in the Fourth, Seventh and Ninth Circuits. (Petition at 14). That is, each of these courts would analyze a zoning exception or conditional use permit requirement as a prior restraint when applied against a First Amendment activity.

Respondents would add cases from the Third, Sixth, Eighth and Tenth Circuits to this list. *See Amico v. New Castle County*, 571 F. Supp. 160 (D. Del. 1983); *Dia v. City of Toledo*, 937 F. Supp. 673 (N.D. Ohio 1996); *Bukaka, Inc. v. County of Benton*, 852 F. Supp. 807 (D. Minn. 1993); *Franken Equities, L.L.C. v. City of Evanston*, 967 F. Supp. 1233 (D. Wyo. 1997).

In an attempt to demonstrate conflict between the Circuits, the City nominates two cases from the Second Circuit as its standard bearers: *Crown Street Enterprises, Inc. v. City of New Haven*, 989 F. Supp. 420 (D. Conn. 1997) and *Marty's Adult World v. Town of Enfield*, 20 F.3d 512 (2d Cir. 1994). However, a careful review of those two cases, and the history of the law in the Second Circuit, shows that there is only harmony between the Circuits. Indeed, the Second Circuit was one of the early leaders in applying the law of prior restraint to zoning situations.

In *754 Orange Ave., Inc. v. City of West Haven, Conn.*, 761 F.2d 105 (2d Cir. 1985), the Second Circuit held that a zoning ordinance targeting adult businesses was an unconstitutional prior restraint because it left unfettered discretion in the hands of decisionmakers. ("[T]he City's threat to enforce its zoning and licensing ordinances against 754 Orange operates as a prior restraint"). *Id.* at 111. This is precisely the holding in the instant case as well as *all* of the other cases which have addressed the issue. Furthermore, this decision is in accord with this Court's ruling in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596 (1990).

The Second Circuit has never overturned, questioned or limited its holding in *754 Orange Ave.* Nevertheless, the City

claims that *Marty's Adult World* and *Crown Street Enterprises* (which relies on *Marty's Adult World*) have reached the opposite conclusion. However, a review of both cases shows that the City's assertion is patently incorrect.

Both of these cases applied the time, place and manner restriction adopted by this Court in *City of Renton v. Playtime, Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986) because there were sufficient sites available elsewhere where adult businesses could open as of right. The fact that a particular applicant was in a location which required a special exception did not create a prior restraint because there were alternate avenues of communication available elsewhere in the jurisdiction. Viewed another way, the sites which required a special exception were surplus locations since abundant sites were available in other zones as a matter of right.

This is not simply a matter of interpretation, but comes directly from the language of the two decisions. In *Marty's Adult World*, the Second Circuit writes:

> The special use permit requirement also is a time, place and manner regulation, since Marty's could operate elsewhere in Enfield without obtaining a special use permit.

20 F.3d at 515.

The complaint in *Crown Street Enterprises* was that a special exception was required for the particular use contemplated by the adult business. However, other adult businesses, with a slightly different format, were allowed as of right in multiple zoning districts. As in the case of *Marty's Adult World*, there were sufficient sites before one considered the special exception. Again relying on the Court's own words we learn the following:

> Similarly, in the present case, while plaintiffs may not open an adult cabaret anywhere in the city without approval, the city may not preclude the operation of plaintiff's business in zones BD, BD-1, BE, IL or IH "simply because" plaintiffs wish to offer topless dancing. Rather, the ordinance restricts dancing in those zones only in the particular context of a dining or drinking establishment.

989 F. Supp. at 423-24.

In the case at Bar, prior restraint analysis was utilized precisely because there were not enough sites available as of right. The district court found that there were only two sites in Jacksonville where an adult business of any kind could operate as a matter of right, without a zoning exception. The district court concluded that those two sites would be inadequate as a matter of law under the *Renton* standards. ("There is no question that if only two sites were available for adult use in a city the size of Jacksonville, it would be insufficient to meet the requirements of *Renton*"). *Lady J. Lingerie, Inc. v. City of Jacksonville*, 973 F. Supp. 1428, 1438 (M.D. Fla. 1997). However, the trial court erroneously counted additional sites that required governmental approval under an arbitrary ordinance which lacked procedural and substantive safeguards. *Id.* at 1438-40. The Eleventh Circuit reversed the decision because it concluded that those sites subject to the zoning exception requirement could not be counted as available for adult uses. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361-63 (11th Cir. 1999). Because Jacksonville did not have sufficient alternate avenues of communication (i.e. sufficient sites for adult uses), the special exception ordinance was properly considered to be a prior restraint.

When analyzed properly, it is evident that there is no conflict between the opinion below and the decisions of the Second Circuit. The Second Circuit case of *754 Orange Avenue* adopted precisely the same prior restraint analysis in a zoning context not unlike this Eleventh Circuit case. *Marty's Adult World* and *Crown Street Enterprises* do not change the law in the Second Circuit one iota. Indeed, both cases are readily harmonized with *Lady J. Lingerie* and *754 Orange Avenue*. There is no conflict between the Eleventh Circuit and any other Circuit and no reason for this Court to exercise certiorari jurisdiction in this case.

A. The City's Position That Prior Restraint Analysis Is Limited To Business Licensing Schemes Is Not Supported By Any Precedent In This Court Or Any Other Court In This Country.

The essence of the prior restraint doctrine is that government may not prohibit free speech in advance except under very precisely defined circumstances, all of which are subject to judicial review. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150, 89 S. Ct. 935, 938 (1969). The City would have the Courts abandon a functional approach to prior restraints in favor of a deterministic system governed by the name assigned to a particular form of legislation: if the ordinance is a "zoning law", it is analyzed under *Renton*; if it is a "license regulation", *FW/PBS* would control. The City would then classify all conditional use permits and zoning exceptions as "*Renton* tools" which would be subject to time, place and manner review. Petitioner prefers to ignore the fact that a conditional use permit can prohibit free speech just as effectively as a general licensing ordinance governing factors other than location.

The City is correct in relying on *Renton* for the proposition that adult businesses must be given a reasonable opportunity to open and operate. *Renton*, 475 U.S. at 54 (Petition at 17). However, nowhere in *Renton*, or in any other decision of this Court, can the City find support for the idea that zoning laws are exempt from the prohibition against unlawful prior restraints. The Eleventh Circuit correctly noted that the subject ordinance acted as a prior restraint because

> [I]t channels nearly all adult entertainment establishments through the exceptions process. That process in turn gives the zoning board discretion to delay a decision indefinitely or to covertly deny applications for content-sensitive reasons.

Lady J. Lingerie, 176 F.3d at 1363.

The Eleventh Circuit recognized that zoning ordinances are commonly upheld as constitutional time, place and manner restrictions. *Id.* at 1361. However, in this instance, the zoning ordinance was utilized in such a manner as to make it equivalent to a licensing requirement:

> [T]o operate in the CCG-2 zone, an adult entertainment establishment must apply for an exception. This makes an exception the equivalent of a license. The City does have a separate licensing procedure for adult entertainment establishments (for which, incidentally, a zoning exception is a prerequisite), but the indispensability of the zoning exception persuades us to treat it like a license as well.

Id.

This decision simply recognizes that adult businesses can be excluded from a community by arbitrarily denying special exceptions in exactly the same manner as the denial of a commercial license. This Court recognized the same danger in *FW/PBS* when it rejected claims that content-neutral licensing regulations applicable to every other business could not be treated as prior restraints. *FW/PBS v. City of Dallas*, 493 U.S. at 223, 110 S. Ct. at 603. The lower courts have all followed the same analysis when presented with zoning ordinances that require government approval before an adult site may open. As one Circuit Court said:

> Following the decision in *Renton*, the Court has made clear that otherwise valid content-neutral time, place and manner restrictions that require government permission prior to engaging in protected speech must be analyzed as prior restraints and are unconstitutional if they do not limit the discretion of the decisionmaker and provide for the Freedman procedural safeguards.

11126 Baltimore Boulevard, Inc. v. Prince George's County, Md., 58 F.3d 988, 995 (4th Cir. 1995).

Designation of an ordinance as a zoning measure as opposed to a licensing regulation has no effect on the legal analysis to be applied in a First Amendment case. This Court, and every other Court which has reviewed the issue, refuses to be fooled by mere nomenclature. *See, e.g., 3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1268 (C.D. Cal. 1996); *Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341 (C.D. Cal. 1995); *TJ's South, Inc. v. Town of Lowell*, 895 F. Supp. 1124 (N.D. Indiana, 1995); *Dease v. City of Anaheim*, 826 F. Supp. 336 (C.D.

Cal. 1993); *15192 Thirteen Mile Road, City of Warren*, 593 F. Supp. 147 (E.D. Mich. 1984); *754 Orange Avenue, supra*; *Bukaka, Inc. v. County of Benton, supra*; *Franken Equities, supra*; *Dia v. City of Toledo, supra*; *Amico v. New Castle County, supra*. The City's arguments to the contrary are merely wishful thinking without any support in the law.

B. Use Of More Stringent Prior Restraint Analysis Will Have No Practical Effect On The City's Ability To Zone Or To Protect The Welfare Of Its Citizens.

The City argues that analyzing zoning laws as a prior restraint is bad policy because it deprives local government of the ability to effectively plan for development. That argument is hogwash. All a City need do is specify a sufficient number of locations or zones where adult businesses may operate as a matter of right. If there are alternate avenues of communication, *Renton* is satisfied and, presumably, citizens have sufficient access to adult communication without interference from censorship bodies sitting as local planners.

There is nothing in the *Lady J. Lingerie* decision, or the dozens of cases like it, which in any way limit government's ability to zone and plan for the benefit of its citizens. *Lady J. Lingerie* and its sister decisions function only to protect society against government attempts to censor objectionable speech. In return, society does not have to give up any of its conventional zoning tools. For instance, local governments commonly restrict adult uses to intensely commercial zones or industrial districts. *See, e.g., Z.J. Gifts D-2, L.L.C. v. City Aurora*, 136 F.3d 683 (10th Cir. 1998); *D.G. Restaurant Corporation v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991). In so doing cities engage in responsible planning by isolating alleged adverse secondary affects.

Government is also free to impose conditional use permits and other special exception schemes when regulating adult businesses, *so long as sufficient sites are available as of right*. This is the lesson to be learned from cases such as *Marty's Adult World*, *supra*. The fact that adult uses are prohibited in some zones or require a special exception in order to locate there does not take away from the fact that adult communication is readily available as a general matter. *See, generally*, *Renton*, 475 U.S. at 54.

The Court in *Lady J Lingerie* did not depart from this principle. The district court found that only two sites were available as of right in the entire consolidated City of Jacksonville. The appellate court was correct in concluding that two sites are not sufficient for a city the size and character of Jacksonville. To hold otherwise would make a mockery of the constitutional protections afforded by this Court in cases such as *Barnes v. Glen Theatre, Inc.*, 502 U.S. 560, 111 S. Ct. 2456 (1991)[1] and *Schad v. Mount Ephraim*, 452 U.S. 61, 101 S. Ct. 2176 (1981).

The City overstates the effect of the appellate decision on its ability to effectively zone both generally and with respect to adult businesses. The Eleventh Circuit made it perfectly clear that the City was free to apply its special exception standards and procedures to any zoning issues other than those governed by the First Amendment:

> To be clear, the City may still use the (c)(1) criteria (and (c)(2), for that matter) for applicants who are not entitled to First Amendment protection. We only find troublesome the

1. In *Barnes*, eight justices concluded that nude dance is entitled to at least "minimal" protection under the First Amendment.

> application of the otherwise-valid zoning criteria to adult businesses like the plaintiffs'.

Lady J. Lingerie, Inc., 176 F.3d at 1362.

Neither is the City precluded from utilizing its zoning powers to address the adverse secondary effects thought to be associated with adult businesses. The Eleventh Circuit stressed that the full panoply of zoning powers is available to the City and that proper laws can certainly be enforced against adult businesses:

> Combating the harmful secondary effects of adult businesses, such as increased crime and neighborhood blight, is a substantial government interest. *See City of Renton*, 475 U.S. at 50-52, 106 S.Ct. 925; *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 583-84, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring in the judgment).
>
> Most zoning ordinances easily meet these standards, but this ordinance does not.

Lady J. Lingerie, Inc., 176 F.3d at 1361.

The class of businesses effected by *Lady J. Lingerie* is limited only to those with serious First Amendment implications. *Id.* at 1362. The City is free to apply its existing laws against car washes, daycare centers and shopping malls; it simply cannot enforce these standards in a First Amendment setting. Thus, the City's concerns about the additional administrative burden imposed by *Freedman* and

FW/PBS is substantially ameliorated by the simple fact that the class of potential applicants is quite small. Only ten to fifteen lingerie businesses operated in the City prior to the enactment of the ordinance. *Lady J. Lingerie*, 973 F. Supp. at 1444. Surely the City has the resources to process these few applications on an expedited basis.

Even if the City elects not to enact new zoning legislation to meet constitutional standards, it is apparent that this ruling will have almost no effect on Jacksonville's daily practices. The decision will have even less impact on businesses and local governments elsewhere in the country. The Petition for Writ of Certiorari does not raise any issue of public policy which would require the attention of this Court.

II. THE DECISION IN *STEAKHOUSE v. CITY OF RALEIGH* IS FROM AN INTERLOCUTORY APPEAL, BASED ON A UNIQUE SET OF FACTS, AND DOES NOT PRESENT A CONFLICT WITH THE DECISION BELOW.

The Fourth Circuit decision in *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634 (4th Cir. 1999) is an isolated case decided on unusual facts and does not truly conflict with the decision below. In addition, the *Steakhouse* appellate decision is unlikely to be the final word even within that case. *Steakhouse* was determined on the basis of an interlocutory appeal from the denial of a preliminary injunction. Accordingly, both the trial court and the appellate court are free to disregard their earlier decisions if the merits of the case show that the injunction was improvidently denied. *See, University Of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.").

While there is no legal bar to the grant of certiorari from an interlocutory appeal, history shows that review of such appeals is rarely advisable. As this Court said in *Carson v. American Brands, Inc.*, 450 U.S. 79, 84, 101 S. Ct. 993, 996-97 (1981).

> [A]ppeal as of right under § 1292(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of "permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc. v. Bodinger*, supra, at 181, 75 S.Ct., at 252. Unless a litigant can show that an interlocutory order of the district court might have a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.

The findings of fact in *Steakhouse* are not even binding on the Fourth Circuit. Nevertheless, the City relies on those facts to argue conflict with *Lady J. Lingerie*. The City focuses on the list of factors which the Raleigh Board of Adjustment utilized in evaluating special exception applications. The City argues that those factors are substantially similar to those considered under the Jacksonville zoning ordinance. However, that leap of faith is not warranted by a comparison of the cases.

The Court in *Steakhouse* merely lists the factors to be considered by the Board of Adjustment. *Steakhouse*, 166 F.3d at 639-40. The ordinance itself is not attached to the opinion

nor is it quoted at any length. There may well have been a definitional section or companion ordinance in *Steakhouse* which expanded on the simple list of factors found in the opinion. In contrast, the entire Jacksonville Ordinance is set forth in the case below and the Eleventh Circuit is justified in concluding that:

> None of the nine criteria is precise and objective. All of them — individually and collectively — empower the zoning board to covertly discriminate against adult entertainment establishments under the guise of general "compatibility" or "environmental" considerations.

Lady J. Lingerie, 176 F.3d at 1362.

Given the interlocutory posture of the *Steakhouse* appeal, and the sketchy information provided by the Fourth Circuit, one simply cannot tell whether the Jacksonville ordinance is similar to the Raleigh ordinance. It would be equally reasonable to conclude that different Courts reached different determinations on the basis of different facts. It is unlikely that *Steakhouse* and *Lady J. Lingerie* will have any great impact beyond the particular facts and the particular litigants.

When the *Steakhouse* case is examined in more detail, it is clear that one unique fact made a substantial impression on the appellate court. The Fourth Circuit was obviously concerned with the disparity between the appellant's legal position and the manner in which it conducted itself below. The appellant complained that the ordinance was defective because it did not provide for prompt review of permitting decisions. Ordinarily, this would prove the death knell for a

permitting ordinance under *FW/PBS*. In this case, however, the applicant went out of its way to delay the proceedings and made it known repeatedly that it was in no hurry to reach a conclusion to the administrative process. The appellate court put it this way:

> . . . Steakhouse's casual pursuit of its permit gives its cries of irreparable injury a tinny pitch. Steakhouse delayed the permitting process on two separate occasions. First, Steakhouse . . . requested that the BOA delay its review until January 13, 1997. Second, on February 3, 1997, Steakhouse's counsel heard the BOA's Sessions Reporter, Donna Hester, dictating the record from the January 13 meeting — a prerequisite to any judicial appeal of the BOA's permit decision. Rather than requesting an expedited effort, or even ensuring that the process was proceeding along its normal schedule, counsel told Hester "there was no rush" and instructed her to take her time. It seems curious to hear Steakhouse now complain about the loss of its asserted rights for "even [a] minimal period[ ] of time." Elrod, 427 U.S. at 373, 96 S.Ct. 2673 (plurality opinion).

Steakhouse, 166 F.3d at 637-638. Clearly the *Steakhouse* decision reflects disdain for the behavior of the individual litigant far more than it indicates any intention to establish new law contrary to that of other circuits.

The intensely factual nature of the inquiry in *Steakhouse* is also reflected in the legal analysis of the appellate court — or rather the lack of that analysis. It is interesting to note that *Steakhouse* does not attempt to distinguish any of the

score of cases which have declared zoning exceptions to be unconstitutional prior restraints. *See, e.g., 3570 East Foothill Blvd., supra*; *754 Orange Avenue, supra*; *Bukaka, Inc. v. County of Benton, supra*; *Franken Equities, supra*; *Dia v. City of Toledo, supra*. None of these cases is even cited in the opinion. The Court also made no real attempt to distinguish *11126 Baltimore Boulevard*, a recent Fourth Circuit case which struck a similar special exception ordinance as a prior restraint against adult speech. 58 F.3d at 992-993.[2]

Instead, the Fourth Circuit expressed its reluctance to allow a preliminary injunction because of the risk that the Plaintiff would obtain a vested right under North Carolina law, irrespective of what the Court ultimately ruled on the merits. *Steakhouse*, 166 F.3d at 638. Far from being a call for rebellion against those Circuits which have agreed with *Lady J. Lingerie*, the *Steakhouse* case should be viewed as an aberration arising from a unique set of facts. Surely *Steakhouse* presents little reason for this Court to take up an issue which has long been settled both by precedent both in this Court and in numerous lower court decisions across the land.

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2. Interestingly, the Petitioner includes the Fourth Circuit among those jurisdictions which are agreement with the *Lady J. Lingerie* analysis of prior restraints in a zoning context. (Petition at 14 n.9). Thus, in Point I of its Petition, the City argues that there is no conflict between the Fourth and Eleventh Circuits, while Point II argues just the opposite with respect to the Fourth Circuit's decision in *Steakhouse*. *Compare*, Petition at 14 and 22-27.

CONCLUSION

The Eleventh Circuit properly determined that the Jacksonville zoning exception ordinance was an unconstitutional prior restraint as applied against adult businesses because discretionary governmental approval was required before such businesses could open in nearly every location in the City. This opinion does not conflict with decisions of the Second Circuit or any other Circuit. Neither does the decision below conflict with *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634 (4th Cir. 1999). *Steakhouse* was an interlocutory appeal from a unique set of facts which has little application within the Fourth Circuit much less to the nation as a whole.

There are no public policy concerns which would warrant the attention of this Court. The City is free to apply its existing zoning code to any business which does not involve First Amendment concerns and is equally free to zone adult businesses into appropriate zones as of right. As the Eleventh Circuit noted below, "[m]ost zoning ordinances easily meet these standards, but this ordinance does not." *Lady J. Lingerie*, 176 F.3d at 1361. The fact that Jacksonville was incapable of passing a constitutional zoning ordinance in this particular instance has no impact beyond the immediate litigants.

Respectfully submitted,

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